

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JAMES TREY NELSON,

Petitioner,

-against-

9:04-CV-564
(LEK/RFT)

JOSEPH SMITH, *Warden*;
NEW YORK STATE ATTORNEY
GENERAL,

Respondents.

DECISION AND ORDER

This matter comes before the Court following a Report-Recommendation filed on March 26, 2008 by the Honorable Randolph F. Treece, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and L.R. 72.3 of the Northern District of New York. Report-Rec. (Dkt. No. 20). After ten days from the service thereof, the Clerk has sent the entire file to the undersigned, including the objections by Petitioner James Trey Nelson (“Petitioner”), which were filed on April 11, 2008. Objections (Dkt. No. 22). Petitioner also filed a Motion to amend/correct his Petition for Writ of Habeas Corpus. Dkt. No. 21. This is Petitioner’s second Motion to amend his Petition, as the first was stricken for failure to attach a proposed Amended Petition. See Dkt. No. 19.

I. Report and Recommendation

It is the duty of this Court to “make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b). “A [district] judge... may accept, reject, or modify, in whole or in part, the findings or

recommendations made by the magistrate judge.” Id. This Court has considered the objections and has undertaken a de novo review of the record and has determined that the Report-Recommendation should be approved for the reasons stated therein.

II. Motion to Amend

Petitioner’s Motion to Amend includes two attachments: Exhibit A, which is his previously filed Petition, and Exhibit B, which is a “supplemental proffer” of legal arguments in support of his Petition and which requests that an unspecified motion be held in abeyance and for leave to file a memorandum establishing his claims for relief under United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). Dkt. No. 21, Exh. B. Construing Exhibit B liberally to constitute, with Exhibit A, a proposed Amended Petition, the Court will consider the Motion to Amend.

By statute, a writ of habeas corpus “may be amended or supplemented as provided in the rules of procedure applicable to civil actions.” 28 U.S.C. § 2242. Rule 15 of the Federal Rules of Civil Procedure governs motions to amend petitions for habeas corpus. See Littlejohn v. Artuz, 271 F.3d 360, 363 (2d Cir.2001); Ching v. United States, 298 F.3d 174, 180-81 (2d Cir. 2002). Even though Rule 15 provides that “leave shall be freely given when justice so requires,” Fed. R. Civ. P. 15(a), the district court may deny that leave on the grounds of futility. Jones v. N.Y. State Div. of Military & Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999).

Petitioner bases his request to amend his Petition on United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). That case, however, was considered and even cited by Judge Treece in the Report and Recommendation. See Report-Recommendation at 4 (“the Supreme Court has held that trial courts retain ‘wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar.’”) (Dkt. No. 20). Unlike the present case, the defendant in Gonzalez-Lopez was not

seeking to replace assigned counsel, and the Government in that case conceded that there was an erroneous deprivation of the defendant's choice of counsel. 548 U.S. at 141-42, 144. In contrast, the record in this case indicates that there was no breakdown of communication or an irreconcilable conflict between the Petitioner and his counsel, as would be needed to substitute new counsel on the eve of trial. United States v. Schmidt, 105 F.3d 82, 89 (2d Cir. 1997). Because the proposed Amended Petition would not change this Court's ruling, Petitioner's Motion to amend is denied.

Accordingly, it is hereby

ORDERED, that the Report-Recommendation (Dkt. No. 20) is **APPROVED** and **ADOPTED** in its **ENTIRETY**; and it is further

ORDERED, that Petitioner's Motion to Amend (Dkt. No. 21) is **DENIED**; and it is further

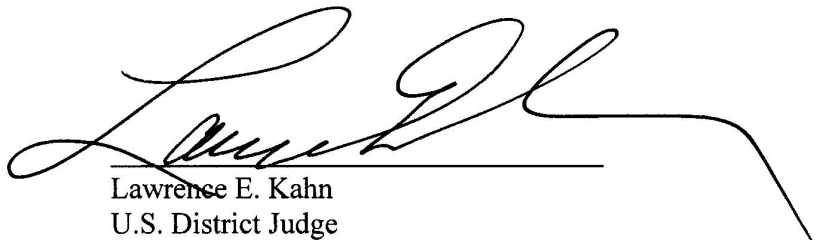
ORDERED, that the Petition for a Writ of Habeas Corpus (Dkt. No. 1) is **DENIED**; and it is further

ORDERED, that no Certificate of Appealability shall issue with respect to any of Petitioner's claims; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

DATED: June 04, 2008
Albany, New York


Lawrence E. Kahn
U.S. District Judge